On Thursday 18 November 2010 the Court of Appeal unanimously upheld a High Court judgment blocking an attempt to introduce US-style class action litigation in the English Courts.

The Court of Appeal emphatically rejected the attempt by two flower importers\(^1\) to bring a claim as representatives of all direct and indirect purchasers of air freight services which were affected by an alleged cartel in the air freight services sector. British Airways, the Defendant in the matter (for whom Slaughter and May acted), had successfully struck out the representative part of the claim at the High Court in April 2009.

The claimants had sought to obtain a form of collective redress for consumers of services through a little-used provision of the Civil Procedure Rules (CPR, Part 19.6) which allows for an action to be brought by one or more claimants as representative(s) of others where all the parties represented have the same interest in the claim.

The opening words of the judgment of the Court, given by Lord Justice Mummery, characterised the appeal as “a bold attempt at keeping a procedural novelty alive”, adding that the “case for a representative action ... was fatally flawed”. Fundamentally, the Court of Appeal concluded that the class was drawn so widely as to make it impossible to identify whether the members of the class had the same interest in the claim.

**POINTS TO NOTE**

- A representative action under CPR, Part 19.6 differs from the procedures used for Group Litigation Orders (“GLO”) in that it does not require each claimant to issue proceedings and then ‘opt-in’ as with the GLO. Instead, the representative parties are considered bound by the judgment in a representative action without having to issue proceedings in their own name. In this sense it is akin to US class actions in which parties are expected to ‘opt-out’ of the class action litigation to avoid being bound by the outcome.

- This representative claim turned on whether consumers of the air freight services could be said to share the “same interest” as (and therefore be represented by) the two named claimants. Since the criteria for inclusion in the class to be represented depended on determining whether those persons were direct or indirect purchasers of air freight services at inflated prices caused by anti-competitive practices, it was not possible to say of any particular person that he was a member of the class until judgment about the underlying liability had been given.

\(^1\) Emerald Supplies Ltd & Southern Glasshouse Produce Ltd
The claim to represent those consumers was further undermined because the represented persons could not have been said to have had the "same interest" if defences were available to claims by some of them but not to claims by others. Those who had passed on the effect of the inflated prices could not have been said to have the "same interest" as those who had not.

**COMMENT**

The Court of Appeal’s judgment underlines the reluctance of the English courts to stretch the provisions of CPR, Part 19.6 to accommodate quasi-class actions. That said, Lord Justice Mummery noted in the introduction to his judgment that there are currently several initiatives aimed at securing redress in these circumstances. He commented that “the issue of redress for price fixing is so pressing that it is currently under consideration by the EC Commission, the UK Office of Fair Trading and the Civil Justice Council”.

Briefly, concerted efforts in 2008 and 2009 to explore a collective redress mechanism were cautiously welcomed by the government. Whilst not in favour of a generic collective redress mechanism, it broadly agreed with the Civil Justice Council’s collective redress concept being explored on a sector-by-sector basis. Efforts to secure a form of collective redress mechanism in the financial sector fell victim to the general election earlier this year when the relevant clauses of the Financial Services Bill were discarded. However, whilst not enacted at that point, there has been no discernible diminution in the appetite for such collective mechanisms and their continued potential to emerge in some form remains very real.

This is nowhere more evident than at the European level, particularly since the European Commission adopted a White Paper in 2008 emphasising the need to ensure that victims of competition law infringements have access to effective private mechanisms for obtaining full compensation for their losses. The Commission’s drive to promote consumer redress has fuelled wide-ranging research into legal policy and prompted a 2009 European Parliament resolution calling on the Commission to create a legislative framework to encompass their agreed recommendations. Much attention has been focused at European level on possible forms of collective redress, including opt-in collective actions and representative actions brought by qualified bodies.

In response to the EU consultation following the White Paper, the OFT also endorsed the view that representative actions should be available to groups of consumers. While the OFT previously promoted the use of representative organisations such as trade associations to advocate for consumers, it has more recently favoured an ‘opt-out’ US-style basis for individually-led group actions. The OFT’s ongoing discussion of the practicalities of this approach suggests that the arrival of collective redress mechanisms domestically is already in sight.

While yesterday’s Court of Appeal judgment represents resounding judicial rejection of US-style class-actions in the English courts, legislative moves in that direction are clearly underway. Collective recourse has now progressed beyond the European policy agenda and into the planning stages. The emergence of some form of collective redress mechanism therefore seems certain – it is less clear how the European and domestic agendas will, however, sit together.

© Slaughter and May 2010

This material is for general information only and is not intended to provide legal advice. For further information, please speak to your usual Slaughter and May contact.